IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972
No. 72-475

WENDELL WARREN AUSTIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR
WRIT OF CERTIORARI TO
THE UNITED STATES
COURT OF APPEALS FOR
THE TENTH CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The Solicitor General is correct in his assertion that the Petitions for Writs of Certiorari of Petitioners Austin and Beeman were filed September 21, 1972 and September 26, 1972.

respectively, and not within the time set forth in Rule 22(2). However, there are mitigating circumstances.

On or about September 6, 1972, Petitioner Austin mailed to the Clerk of the Supreme Court a Motion for an Additional 20 days in which to file a Petition for Writ of Certiorari. Although the date of mailing was within the time period as set forth in the rules, it did not arrive until five days thereafter. The Clerk of the Supreme Court rejected the filing of this Motion since it was not timely received.

If this Motion had been filed and granted, the Petition for Writ of Certiorari would have been timely filed as per Rule 22(2).

This was the first experience that Petitioner's attorney has ever had in the preparation a Petition for Writ of Certiorari, and he had a misapprehension of the time limitation set forth in Rule 22(2).

It should be noted that Petitioner Savidge (Case No. 72-5451) filed his Petition for Writ of Certiorari timely. Since the issues involved in the Petition of Savidge for Writ of Certiorari are substantially the same as those presented in the Petitions of Austin and Beeman (Case No. 72-5476), Petitioner Austin feels that the Solicitor General will not be unduly prejudiced by the slight error due to the oversight of Petitioner's attorney, and that this case should be adjudicated on the merits of the issues presented within the Petition for Writ of Certiorari.

The Petitioners' principal contentions, as alleged in the Petitions for Writ of Certiorari, were never carefully considered by the Court of Appeals in accordance with the law. The decision that the trial court could determine a "letter of commitment" is a security as defined by 15 U.S.C. §77(b) as a matter of law is in conflict with the case law on this subject and without precedent.

As set forth in Petitioner's Petition for Writ of Certiorari, this decision of the Circuit Court of Appeals that the trial court did not make prejudicial error when it made a finding as a matter of law about a disputable question of fact and removed this factual question from the jury is tantamount to a denial of a trial by jury and is in conflict with case law.

The Court of Appeals never fully evaluated the sufficiency of the evidence against Petitioner Austin. There was no evidence that Austin ever participated in any manner in the transaction which was the subject matter of the trial or aided and abetted therein. The Court of Appeals misstated the evidence in stating on page 18 of its Opinion that Petitioner Austin "Finally, . . . came on the scene also promising to come forward with the funds, . . . " There was no such evidence presented at the trial. The alleged victims, as well as the two key witnesses for the Government, all testified that Petitioner Austin had nothing whatsoever to do with this transaction. The Court of Appeals could not have come to the decision they came to if it had carefully evaluated the evidence.

The Court of Appeals failed to fully consider the inherent unfairness and injustice of the trial court's conduct of this trial. Allowing several weeks of evidence pertaining to unrelated transactions to be introduced prior to the Government's producing evidence on the subject matter of the trial, and reserving rulings on materiality and relevancy of evidence elicited from over 90 witnesses and approximately 1,000 exhibits during the six week trial until the close of the trial, and then allowing such evidence to be admitted without regard to relevancy and materiality, subjected the Petitioner to a loss of his Constitutional guaranties of a fair trial.

It is therefore respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be granted.

Respectfully submitted,

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